IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 530

UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFFILIATED WITH THE CONGRESS OF INDUSTRIAL ORGANIZATIONS, UAW-CIO,
Appellant,
vs.
WISCONSIN EMPLOYMENT RELATIONS BOARD and KOHLER CO., a Wisconsin corporation,
Appellees

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

REPLY BRIEF ON BEHALF OF THE APPELLANT

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Appellant files the instant reply to emphasize certain weaknesses in appellees' case, as revealed by their motions to dismiss the instant appeal.

I.

CONGRESS HAS PROVIDED AN ADEQUATE AND EXCLUSIVE REMEDY TO DEAL WITH THE CONDUCT WISCONSIN HERE ATTEMPTED TO ENJOIN.

W. E. R. B. argues there is no "adequate" federal remedy to prevent mass picketing, interference with traffic, domiciliary picketing and threats of violence. *This is not so.* All such conduct has been held to constitute unfair labor practices within the meaning of the National Labor Relations Act, as amended, and as such is subject to cease and desist orders of the National Labor Relations Board and, at the request of that Board, subject to *temporary restraining orders issued by the Federal District Courts immediately upon issuance of the Board's complaint and prior to final adjudication* [29 U. S. C. 160 (a) (c) (j)]. To characterize, as do appellees, the federal procedure as slow and inadequate is both inaccurate and, in any event, an argument which should be addressed to Congress.

See: *Cory Corporation*, 84 N. L. R. B. 972—mass picketing;

Mercury Mining and Construction Corporation, 96 N. L. R. B. 1389—prevention of ingress and egress;

Irwin-Lyons Lumber Company, 87 N. L. R. B. 54—threats and intimidation;

Mine Workers Local 12824, 112 N. L. R. B. No. 24—interference with traffic;

Perry Norwell Co., 80 N. L. R. B. 225—intimidating employee at domicile.[1]

Thus, appellees cannot be heard to argue that appellant's conduct is not subject to regulation by the federal unfair labor practice procedure which Congress indicated and this Court has held is exclusive.

Kohler, in its motion to dismiss (on pages 3, 4 and 5) makes the argument that paragraphs 3 and 4 of the State Board Order, being unrelated to coercion of employees, do not duplicate rights, prohibitions and remedies under the federal Act. We believe that an examination of Kohler's complaint filed with W. E. R. B. (R. 121-125) as well as the aforementioned paragraphs reveal that their entire thrust is directed towards the prohibition of coercion of employees in exercise of their rights. Their reference is to entrance to and egress *from the Kohler Company* and to streets and highways leading to *the premises of the Kohler Company.* We find it hard to accept what is obviously an afterthought, namely, that Wisconsin was regulating traffic. An unfair labor practice proceeding is a peculiar manner of doing so. If Wisconsin had really been concerned with the regulation of traffic (instead of, as obviously was the case, with the regulation of labor relations and a labor dispute) it might have enforced state traffic laws and local traffic ordinances. Furthermore, the determination that some of the conduct in-

[1] We discovered this NLRB decision subsequent to our statement on page 12 of the Jurisdictional Statement that we were unable to find a case specifically involving picketing of employee domicile. See also *Abe Meltzer, Inc.*, 108 NLRB 1506; *United Mine Workers, District 2*, 103 NLRB 1572; *Colonial Hardwood Flooring*, 84 NLRB 563; *Bechtel Corp.*, 108 NLRB 1070; *The Englander Co., Inc.*, 108 NLRB 38; *United Electrical Workers*, 106 NLRB 1372; *Union Supply Co.*, 90 NLRB 436; *Bell Aircraft Co.*, 105 NLRB 755; *Progressive Mine Workers, International Union v. NLRB*, 187 F. 2d 298 (C. A. 7), enf. 89 NLRB 1490.

volved is not subject to federal regulation belongs, as this Court has held, in the first instance to the National Labor Relations Board. *Garner v. Teamsters Union*, 346 U. S. 485, 490; *Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468, 75 Sup. Ct. 480, 486. The same is true of the affirmative part of the state order which includes relief (by limiting the number of pickets) that, Kohler argues, would not be allowed by N. L. R. B. We believe questions such as whether or not certain types of relief are appropriate or available under the federal statute should also be resolved in the first instance by the federal Board.[2] In any event, it seems clear to us and we shall seek to demonstrate in more detail below, the State may not, in a state unfair labor practice proceeding *enlarge* upon the exclusive federal unfair labor practice procedure.

We emphasize in this connection what was already pointed out in our Jurisdictional Statement (on page 8), namely, that the very acts and conduct enjoined by W. E. R. B. are pleaded by Kohler Company (which filed the *state* complaint) in defense of the N. L. R. B. complaint in Case No. 13-CA-1780. The company, in that case, has already introduced proof of all such acts and conduct in justification for its own conduct charged as unfair labor practices under the National Labor Relations Act. Such proof has been received by the trial examiner of N. L. R. B. and is part of the record in that continuing proceeding. Thus, the very conduct enjoined by W. E. R. B. is now the subject matter and basis for fact finding and legal determinations by the federal Board. Surely, the conflict intended to be avoided by federal pre-emption of unfair labor practices and unfair labor practice proceedings cannot be more drastically illustrated than here.

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[2] NLRB's statutory authority in unfair labor practice cases includes power to "* * * issue * * * an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action * * * as will effectuate the policies of this Act." (29 U. S. C. 160 (c).)

II.

THE STATE MAY NOT DUPLICATE THE EXCLUSIVE FEDERAL PROCEDURE FOR PROHIBITING UNFAIR LABOR PRACTICES, WHATEVER ITS CONTINUED AUTHORITY MAY BE TO PROHIBIT OR PUNISH SUCH CONDUCT IN THE TRADITIONAL MANNER BY ENFORCING CRIMINAL LAWS OF GENERAL APPLICABILITY OR OTHER "HISTORIC" MEANS.

Appellees read recent decisions of this Court as reserving to the states "police control" by means of "extraordinary police measures" in the prevention of breaches of the peace and related conduct. From this they reason that the State having such power, it may exercise it by defining and enjoining unfair labor practices under a state labor act even though this same conduct also constitutes unfair labor practices under the federal labor law. We submit that, whatever the accuracy of the premise, it is plain from this Court's decisions that the conclusion does not follow. This Court has found that Congress intended the *procedures* for the prevention of unfair labor practices to be *exclusive* and has therefore prohibited the *duplication of the federal remedy* with regard to such conduct by the State. In this connection we draw attention to appellees' completely inapposite if not misleading, citation of and quotation from *Algoma Plywood and Veneer Company v. W. E. R. B.*, 336 U. S. 301. This Court in that case allowed the State to prohibit enforcement of a maintenance of membership clause. "Since nothing in the Wagner or Taft-Hartley Acts sanctioned or forbade these clauses, they were left to regulation by the State." (*Weber v. Anheuser-Busch*, 348 U. S. 468). The National Labor Relations Act, as amended, in Section 14 (b) [29 U. S. C. 164 (b)] specifically authorizes application of state and territorial laws regulating union security

agreements. On the other hand, this Court in the *Algoma* case recognized the *exclusive* character of N. L. R. B.'s unfair labor practice procedures, stating:

> "* * * Section 10 (a) was designed * * * to preclude conflict in the administration of remedies for the practices proscribed by Section 8." (336 U. S. 301, 306.)[3]

We have already shown that Wisconsin here did, in fact, enjoin practices proscribed by Section 8.

This Court's concern with duplication of the exclusive federal remedy was again revealed in *Weber v. Anheuser, Busch*, 348 U. S. 468:

> "In *Garner*, the emphasis was * * * on two similar remedies, one state and one federal, brought to bear on precisely the same conduct."

This is exactly the case here.

We expressed on pages 14 and 15 of our Jurisdictional Statement, disagreement with *United Construction Workers v. Laburnum Construction Corporation*, 347 U. S. 656. That decision, however, need not be reversed for appellant to prevail here, for in *Laburnum* "* * * the *violent conduct* was reached by a remedy having no parallel in, and not in conflict with, any remedy afforded by the federal Act." (Italics supplied; *Weber v. Anheuser-Busch*,

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[3] The cession proviso in Section 10 (a) (29 U. S. C. 160 (a)) indicates a clear Congressional intent to make these federal procedures exclusive, leaving the states free to act only where cession has taken place pursuant to the proviso. This Court said in *Bus Employees v. WERB*, 340 U. S. 383, 397: "Congress demonstrated that it knew how to cede jurisdiction to the states."

supra).[4] The inference is clear that the State is *without* jurisdiction to regulate "*violent conduct*" where the state remedy has a parallel in the federal Act (to the extent, as is the case here, of exactly duplicating it). The very quotation from the *Laburnum* case contained on page 5 of W. E. R.B.'s motion proves our point, it becoming apparent from it that *the state procedure survives only if there is no conflict with the federal remedy.*[5]

III.

THIS COURT'S CITATION OF ALLEN BRADLEY, FOLLOWING THE ENACTMENT OF THE TAFT-HARTLEY AMENDMENTS, MEANS AT MOST THAT THE STATES MAY PROHIBIT OR PUNISH CONDUCT AS IS INVOLVED HERE IN A MANNER NOT PARALLELING, DUPLICATING, OR CONFLICTING WITH THE FEDERAL REMEDY.

An examination of pages 4 and 5 of W. E. R. B.'s motion suggests that Wisconsin does not understand "the rule announced in *Allen-Bradley*". This rule appears to be as follows:

> "Congress has not made such employee and union conduct as is involved in this (the *Allen Bradley*) case subject to regulation by the Federal Board." 315 U. S. 740, 749.
>
> "Certain conduct, such as mass picketing, threats, violence, and related actions we held (in *Allen Bradley*) were not governed by the Wagner Act, and hence Wisconsin was free to regulate them." (*Hill v. Florida*, 325 U. S. 538, 539.)

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[4] The federal remedy being preventive rather than remedial. Here the WERB order appears to be preventive in the same sense as this Court (in *Laburnum*) characterized the federal remedy.

[5] "* * * the care we took in the *Garner* case to demonstrate the existing conflict between state and federal administrative remedies was, itself, a recognition that *if no conflict had existed, the state procedure would have survived* * *." (Italics supplied.)

> "The Court held (in *Allen Bradley*) that such conduct was not subject to regulation by the federal Board, either by prohibition or by protection." *(Weber v. Anheuser-Busch, supra.)*

It can be argued from these summaries of the "rule in *Allen-Bradley*" that the *ratio decidendi* of that case is no longer applicable because now "such conduct" *is* subject to prohibition by the federal Act and Board.[6] We realize that this Court, nonetheless, has continued to cite *Allen-Bradley* in support of state power to exercise "police control" and take "extraordinary police measures" to prevent breaches of the peace and preserve public safety and order and use of streets and highways (*cf. Garner v. Teamsters Union*, 346 U. S. 485, 488; *International Union v. O'Brien*, 339 U. S. 454, 459). We submit the only way in which these expressions of the Court concerning *Allen-Bradley* can be kept consistent with the rule of *Garner* and *Anheuser-Busch* (that the states may not enjoin unfair labor practices coming under the jurisdiction of N. L. R. B. and may not duplicate the procedures and remedies of the federal Board), is to hold that the states may control violence only by procedures not duplicating the federal remedy. That this appears, in fact, to be the Court's position is apparent from the *Laburnum* decision. This, we submit, is also the significance of the Congressional debates reproduced, in part, on pages 9 through 12 of Kohler's motion to dismiss this appeal. These Congressional discussions reveal, at most, that in situations similar to the case at bar two remedies (but certainly not two *identical* remedies)—one state, one federal—might be

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[6] This same *ratio decidendi* applies to *International Union UAW-AFL v. WERB*, 336 U. S. 245, for the conduct there involved was, in the view of this Court, neither protected by the federal Act nor forbidden by it.

brought to bear on the same conduct. The reference is always to "good local law enforcement" of "State and local *police* law". Such references seem to apply to the enforcement of criminal laws of general applicability in the ordinary exercise of "police power" for the maintenance of the public peace, or to similar "historic" measures. Congress, in *29 U. S. C.* 160(a), would hardly have established an exclusive procedure for the prevention of unfair labor practices (indicating the *specific method* for ceding jurisdiction in unfair labor practice cases to the States) and at the same time have intended the states to apply the identical remedy to the same conduct.[7]

Wisconsin here, of course, precisely duplicated the federal remedy in an unfair labor practice proceeding under the state labor act.

Respectfully submitted,

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[7] The case of *Schneider v. Irvington*, 308 U. S. 147, cited on page 4 of Kohler's motion for the proposition that a State may regulate use of its streets and highways as long as it abridges no federal rights is, of course, inapplicable to the case at bar where the conduct involved is subject to prohibition by an exclusive federal procedure.